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IN THE

SUPREME COURT OF THE UNITED STATES

January Term, 1981

NO.

JAMES H. HOLMES,

Petitioner.

v.

UNION GOSPEL PRESS AND
STATE OF OHIO, OHIO BUREAU OF
EMPLOYMENT SERVICES

PETITION FOR WRIT OF CERTIORARI
TO THE OHIO SUPREME COURT

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Counsel for Petitioner

March 20, 1981

QUESTIONS PRESENTED

The Ohio Bureau of Employment Services denied the appeal of petitioner, James H. Holmes, for employment benefits because his appeal was not timely filed, even-though the notice denying his benefits was never received by petitioner. The question thereby arising is:

1. Whether Ohio Revised Code §4141.28(H) is constitutionally defective and contrary to 42 U.S.C. 503(a)(3) denying a claimant a right of appeal when he has never received a notice of the denial of his compensation rights from the Bureau of Employment services.

LIST OF PARTIES

James H. Holmes
Union Gospel Press
State of Ohio
Bureau of Employment Services

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PETITION FOR A WRIT OF CERTIORARI
TO THE OHIO SUPREME COURT

The Petitioner, JAMES H. HOLMES, prays that a writ of certiorari issue to review the opinion and judgment of the Supreme Court of Ohio rendered in these proceedings on December 23, 1980.

OPINIONS BELOW

The opinion of the Ohio Supreme Court is reported in 64 OhioSt.2d 186, 18 003d 405 (1980) and appears at Appendix A, infra, pp. 1-8 . This matter was certified to the Ohio Supreme Court by the Ninth District Court of Appeals, which is unreported, and appears at Appendix B, infra, pp. 1-2 . The matter was certified to the Ohio Supreme Court because of a conflict with that decision and the case of Adams v. Giles, reported in 60 Ohio App.2d 315, which appears at Appendix C, infra, pp. 1-7 . The decision of the Ninth District Court of Appeals also conflicted

with the case of McCruter v. Board of Review, also unreported, appears at Appendix D, infra, pp. 1-9 . The decision of the Ninth District Court of Appeals affirmed the judgment of the Common Pleas Court of Medina County, which opinion is also unreported and set forth as Appendix E, infra, pp. 1-6 . The decision of the Common Pleas Court of Medina County affirmed the decisions of the Administrator and the Board of Review of the Ohio Bureau of Employment Services, both decisions are unreported and set forth as Appendix F, pp.1-2 and Appendix G, pp.1-4.

JURISDICTION

The judgment of the Ohio Supreme Court was entered on the 23rd day of December, 1980. See Appendix A, infra, pp. 1-8 . This petition for certiorari is filed less than 90 days from the date aforesaid. The jurisdiction of this

Court is invoked under 28 U.S.C. §1257(2).

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Amendment XIV, §1:

> "... nor shall any state deprive any person of life, liberty, or property without due process of law ..."

Article I, Section 16, Ohio Constitution, Redress in Courts:

> "All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay."

U.S.C. 42 §503(3):

> "Opportunity for a fair hearing, before an impartial tribunal, for all individuals whose claim for unemployment compensation are denied;..."

Ohio Revised Code §4141.28(H):

> "Any interested party may appeal the administrator's decision on reconsideration to the board and unless an appeal is filed from

such decision on reconsideration with the board within fourteen calendar days after such decision was mailed to the last known post office address of the appellant such decision on reconsideration is final and benefits shall be paid or denied in accordance therewith."

STATEMENT OF FACTS

The facts relevant to the question presented by this petition are without any great dispute and are as follows:

The petitioner, JAMES H. HOLMES, made application for unemployment benefits with the Ohio Bureau of Employment Services at its office in the City of Medina, Ohio. After a period of time, when he had not received any notice or heard anything concerning his benefits, he went back to the local office of the Ohio Bureau of Employment Services and made inquiry concerning the status of his matters. This was done on the 3rd day of May, 1978. It was on this

occasion that he learned, on the 14th of April, 1978, a notice was mailed to him by ordinary mail stating that his benefits had been denied. As a result of this information petitioner filed a notice of appeal. At this point petitioner's notice of appeal was filed beyond the 14 day limit prescribed by §4141.28(H) of the Ohio Revised Code.

At a hearing before the referee of the Ohio Bureau of Employment Services, petitioner explained that he had not received the notice of the adverse decision concerning his benefits and that he could not appeal timely. Even so, the referee of the Ohio Bureau of Employment Services dismissed his appeal as not being timely filed. A copy of the referee's decision is set forth in the Appendix G, pp. 1-3 . At this stage of the proceedings petitioner was not represented by counsel, eventhough

Union Gospel Press did in fact have their attorney present. This matter was then appealed to the Board of Reveiw of the Ohio Bureau of Employment Services which affirmed the decision of the referee, and it was then timely appealed to the Common Pleas Court of Medina County. During the hearing before the Common Pleas Court of Medina County petitioner attempted to introduce additional evidence to indicate that he had not received the notice denying his benefits. This additional testimony was prohibited by the Common Pleas Court of Medina County.

The decision affirming the Board of Review of the Ohio Bureau of Employment Services was timely appealed to the Ninth District Court of Appeals which affirmed the decision of the Common Pleas Court. Because this decision was in conflict with the reported case of Adams v. Giles, 60 Ohio App.2d 351 (1978) and the unreported case

of McCruter v. Board of Review, Richland County, No. 1828, (Fifth Dist. Ct. App. Dec. 27, 1979), the Ninth District Court of Appeals certified this case to the Ohio Supreme Court for review and determination.

As a result of this certification the Ohio Supreme Court issued its decision on the 23rd of December, 1980, finding that the filing of a notice of appeal pursuant to §4141.28(H) of the Ohio Revised Code is totally and irrevocably jurisdictional and failure to comply with its mandate is fatal.

This decision drew a dissent from one judge of the Ohio Supreme Court, who specifically stated that the petitioner's "...due process rights had been violated in that he had not been notified of the adverse decision within a reasonable time to appeal."

It is also interesting to note that

during oral argument before the Ohio Supreme Court Judge Locher asked counsel for the State a most revealing question.

Judge Locher wanted to know, if a postal employee were to throw a letter containing a notice of the decision of the Ohio Bureau of Employment Services into the sewer and thereby prevented a person from receiving such notice, if this would in fact prohibit a person from appealing where he did not find out about such decision within the requisite 14 days. This question went unanswered during oral argument and it serves to highlight the very problem presented to the Ohio Supreme Court and which has given rise to this petition for certiorari.

REASONS FOR GRANTING THE WRIT

1. Failure to allow the petitioner to file his appeal of a decision denying him unemployment benefits where he never received such notice of denial is contrary to due process of law and a violation of 42 U.S.C. 503(a)(3).

This is a matter that is being brought before the United States Supreme Court because it has sparked considerable debate within the court system in the State of Ohio. The statute in question was originally more liberal in handling questions concerning notice. See Wycuff v. Fotomat Corp., 36 OhioApp.2d. 145, 65 OO2d 184 (Ct.App. Franklin Co., 1973) at page 151 of Ohio App.2d version and 188 OO2d version wherein the court said:

> "We do not mean to imply that the appeal time cannot be made to commence upon mailing, but, rather, to indicate that all interested parties must be afforded an equal opportunity to

to appeal and construe the statute to effectuate that requirement."

In 1975 the existing statute was amended to read as it is now and this led a Court of Appeals of Cuyahoga County, in an unreported case, No. 37800, Wilson v. Board of Review, (Ct. App. 8th Dist. Cuyahoga Co., 1978) See Appendix H, infra, pp. 1-15, to conclude that mailing of the notice of decision by ordinary mail was constitutionally permissible.

This case is also interesting because it contains a complete discussion of all the various ramifications of the matter being brought to the Supreme Court in this petition. In particular, it also discusses the effect of Mullane v. Central Hanover Bank & Trust Co., (1959), 339 U.S. 306, 94 L.Ed.2d.

It is the Mullane case that has allowed the Ohio Supreme Court to decide in this particular proceeding that the petitioner

should not be given a right of appeal. The majority of the Ohio Supreme Court relied very heavily on Mullane which held that a notice must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present the objections." It has been extremely difficult to understand how that language could be interpreted in this instant proceeding to indicate that the petitioner was afforded an opportunity to present his objection. There is no doubt that the petitioner never received the decision which gave right to an appeal and that he only appealed on the basis of a fortuitous encounter with the Ohio Bureau of Employment Services office in Medina, Ohio.

Further, the majority opinion of the Ohio Supreme Court, relies upon language in Mullane which holds that the constitu-

tionality of a notice mechanism is dependent upon the liklihood of its ultimate success. In this particular matter the notice mechanism used, failed miserably. Because of this fact, dissenting Judge Locher felt that the mailing of the notice of denial from the Bureau of Employment Services merely created an irrebuttable presumption of notice. This position, of course, is supported by the case of Adams v. Giles, 60 OhioApp.2d. 351 (1978), whereby the petitioner would have been allowed to explain why he did not timely appeal the decision of the Bureau of Employment Services. Certainly, where the petitioner never received a notice, this explains why he did not timely appeal pursuant to §4141.28(H) of the Ohio Revised Code.

In addition to the question of the constitutionality of the statute involved, there is also the question of whether or not the procedure involved in this matter

is fair as prescribed by 42 U.S.C. 503(a)(3). This statute specifically requires that a fair hearing be held before an impartial tribunal where unemployment compensation rights have been denied. This is supported by the case of Steinberg v. Fusari, 364 F.Supp. 922 (D. Conn. 1973) reversed on other grounds by the United States Supreme Court. Certainly, a proceeding where a claimant's rights are denied because he did not timely appeal from a notice he never received, cannot be construed under any sense of the imagination as a fair proceeding. In reviewing a similar statute of the Ohio Revised Code, Judge Duncan, in the case of Robinson v. Campbell, 1A Unemploy. Insur. Reptr. (CCH) New Devel. para. 21,509 (S.D. Ohio, 1977), held that failure to receive a notice created merely a rebuttable presumption and not the irrebuttable presumption employed by the Ohio Supreme Court.

Certainly, this is the fairer approach to the problem presented by this petition.

Where a petitioner has not timely appealed because he has not received a notice which would allow him to appeal timely, and thereby lost his unemployment rights, then such loss of rights is clearly a violation of due process and grossly unfair.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Supreme Court of Ohio.

Respectfully submitted,



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March 20, 1981

OPINION, OHIO SUPREME COURT, NO. 80-481

Decided December 23, 1980

HOLMES v. UNION GOSPEL PRESS

Per Curiam. The sole issue raised by this appeal is whether R.C. 4141.28(H) is unconstitutional on its face. This section gives any interested party the right to appeal an administrator's decision on reconsideration to the board of review within 14 calendar days after the decision on reconsideration was mailed to the last known post office address of the appellant.

Appellant argues that the statute is unconstitutional because it denies him due process of law by barring his appeal when he does not file it within the time required by the statute. He argues that the statute should be interpreted to create only a rebuttable presumption.

The United States Supreme Court in the case of Mullane v. Central Hanover Bank & Trust Co. (1950), 339 U.S. 306, stated the test to be applied in determining whether

a statute providing for notice is constitutional. The court stated at page 314, that the notice must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." We have consistently held that where a statute confers a right of appeal, as in the instant case, strict adherence to the statutory conditions is essential for the enjoyment of the right to appeal. American Restaurant & Lunch Co. v. Glander (1946), 147 Ohio St. 147; Zier v. Bureau of Unemployment Compensation (1949), 151 Ohio St. 123; Todd v. Garnes (1975), 44 Ohio St. 2d 56.

In the recent case of In re Foreclosure of Liens (1980), 62 Ohio St. 2d 333, we rejected an argument similar to appellant's argument in this case. In that case, the

constitutionality of R.C. 5721.18(B) was attacked on the ground that it provided only for a copy of a notice of the filing of a foreclosure action to be mailed by ordinary mail to the address of the person set forth in the complaint. At page 336, we stated the law as follows:

> "The constitutionality of a notice mechanism is dependent upon the likelihood of its ultimate success in notifying an interested party of a pending action. The precise test was articulated by the United States Supreme Court in Mullane v. Central Hanover Bank & Trust Co. (1950), 339 U.S. 306, wherein the court held, at page 314, that a method for providing notice must be 'reasonably calculated, under all circumstances, to apprixe interested parties of the pendency of the action and afford them an opportunity to present their objections.'"

We held that the notice mechanism provided in R.C. 5721.18(B) was reasonably calculated to give interested parties notice of a pending action.

There is no significant distinction between the effect of the notice requirement in R.C. 4141.28(H) and 5721.18(B). The

requirement of R.C. 4141.28(H), that the administrator's decision on reconsideration be mailed "to the last known post office address of the appellant," contemplates that the administrator will mail the copy of the decision to the most current address available in the records of the bureau. That requirement is reasonably calculated to apprise the appellant of the decision and to afford him an opportunity to appeal within rule. R.C. 4141.28(H) meets the test of Mullane, supra, and in re Foreclosure of liens, supra, and is therefore not unconstitutional on its fact.

Accordingly, the judgment of the Court of Appeals is affirmed.

Judgment affirmed.

CELEBREZZE, C.J., W. BROWN, P. BROWN, SWEENEY, HOLMES AND MOYER, JJ., concur.

LOCHER, J., dissents.

LOCHER, J., dissenting. I dissent from the majority opinion which, in effect, creates an irrebuttable presumption denying the claimant a right to appeal from the failure to file an appeal within 14 days, where the claimant did not receive notice of the adverse decision within that same 14 day period.

Reliance on Mullane v. Central Hanover Bank & Trust Co. (1950), 339 U.S. 306, is misdirected in that the test of notice of "reasonably calculated, under all the circumstances" is expressly limited to those situations in which there are "practicalities and peculiarities."

The United States Supreme Court, in Mullane, supra, at pages 314-315, stated:

"***But if with due regard for the practicalities and peculiarities of the case these conditions are reasonably met, the constitutional requirements are satisfied.***

"***The reasonableness and hence the constitutional validity of any chosen method may be defended on the ground that [the]*** conditions do not reasonably permit such notice, that the form chosen is not substantially less likely to bring home notice than other of the feasible and customary substitutes.

"It would be idle to pretend that publication alone, as prescribed here, is a reliable means of acquainting interested parties of the fact that their rights are before the courts. It is not an accident that the greater number of cases reaching this Court on the question of adequacy of notice have been concerned with actions founded on process constructively served through local newspapers.***"

In Roller v. Holly (1900), 176 U.S. 398, the court noted that a five-day notice to a nonresident in another state on a suit to foreclose a lien on land, where it would require four days of constant traveling to reach the court, is insufficient

to constitute reasonable notice of due process of law.

Quite clearly herein, appellant's due-process rights had been violated in that he had not been notified of the adverse decision within a reasonable time to appeal.

When notice is a person's due, process which is mere gesture is not due process. Covey v. Town of Somers (1956), 351 U.S. 141.

Further analysis of Mullane, supra, reveals that the court, quoting from other United States Supreme Court decisions, at page 315, stated:

"The criterion is not the possibility of conceivable injury but the just and reasonable character of the requirements, having reference to the subject with which the statute deals.***"

The subject to which R.C. Chapter 4141 pertains is the Unemployment Compensation Act, which undisputably is of critical

importance to the financially crippled unemployed worker.

To make the character of the requirements just and reasonable, the claimant should be allowed to rebut the presumption of the receipt of the adverse decision by credible evidence and, if that is accomplished, the board may obtain jurisdiction over the merits of the cause.

The additional scope of procedure would not impose a great financial or administrative burden upon the board.

The mailing of the administrator's decision to the claimant should raise only a rebuttable presumption that the claimant was, in fact, notified. The mere certification by a government employee as to the fact of mailing should not automatically bar a claimant without a further inquiry.

CERTIFICATION TO SUPREME COURT OF OHIO
FROM COURT OF APPEALS, NINTH JUDICIAL
DISTRICT, MEDINA COUNTY, OHIO

JAMES H. HOLMES v. UNION GOSPEL PRESS

C.A. NO. 905

JOURNAL ENTRY

The judges of the Court of Appeals of the Ninth Judicial District of the State of Ohio find that the judgment upon which they agreed in this cause is in conflict with the judgment based upon the same issue by the Court of Appeals of the Fifth Judicial District in Mable J. McCruter v. Board of Review, et. al., Richalnd Co. No. 1828 (5th Dist. Ct. App. December 27, 1979) (unreported), and by the Court of Appeals of the First Judicial District in Adams v. Giles, et. al., 60 Ohio App. 2d 351 (1978).

The issue in conflict is whether Revised Code Section 4141.28(H), which charges a claimant with notice upon the mailing of a Bureau of Unemployment Services decision,

is sufficient to meet the federal and state constitutional requirement of due process of law.

Wherefore, the record of this cause, to wit: James H. Holmes v. Union Gospel Press, et. al., is hereby certified to the Supreme Court of Ohio for review and final determination.

Dated at Akron, Ohio, this 21 day of March, 1980.

/S/ Bell, presiding judge

/S/ Mahoney, Judge

OPINON, COURT OF APPEALS FOR HAMILTON COUNTY, NO. C77571-Decided December 13, 1978.

ADAMS, v. GILES, ADMR., ET. AL.

Judgment affirmed.

Black, J. Appellant Bureau of Employment Services (OBES) claims that the court of common pleas erred in reversing a decision of its Board of Review. The employee's administrative appeal to the Board of Review had been dismissed by the Board's referee because the employee failed to file it within the fourteen calendar day limitation set forth in R.C. §4141.28(H).

Originally, the OBES administrator denied appellee unemployment benefits under R.C. §4141.29(D)(2) on the basis that she was dismissed from her position as grocery clerk for just cause (unexcused absence). She requested reconsideration, alleging excusable absences (an allegation which her employer's records supported), but the administrator reaffirmed his initial decision denying unemployment benefits. The

record of proceedings contains a cerrificate that on July 6, 1976, a notice of the decision on reconsideration was sent by regular mail to appellee at her residence. She testified under oath that she never received the notice. Neither the administrator nor the referee had any direct evidence to the contrary. The state of the record suggests that the notice may have been lost in the mail and never received by appellee.

Appeleee also testified under oath that on July 15, 1976, when she reported to the local OBES office for her biweekly interview, she asked about the status of the request for reconsideration. She was told that the procedure might take six to eight weeks and that she would be notified by mail. These statements ignored the fact that the notice had already been mailed on July 6, 1976.

At her next interview on July 29, 1976, at the local OBES Office, appellee was told that the administrator had reaffirmed the denial of her benefits, that the notice had been mailed, that the fourteen day period of limitation had expired and that she had lost her right to appeal. The next day she filed her notice of appeal with the Board of Review requesting a hearing.

Her request was granted, but the referee considered only the timeliness of her appeal and never reached the issue of substance -- whether her discharge from employment had been for just cause. Appellee was the only witness, and she told her story as above set forth. No one appeared for the employer, and no evidence about the mailing of the notice was presented other than the certificate of the mailing clerk in the OBES office. The referee and later the Board of Review, dismissed her appeal as not timely filed. While the official papers dismissing the appeal do not so state,

the basis for the dismissal had to be that the fact of mailing raised a conclusive presumption that appellee had been duly notified of the adverse decision of the Administrator as of the day of mailing, so that the fourteen day period of limitation in R.C. §4141.28(H) began to run that day.

Division (H) of R.C.§4141.28 reads as follows:

> "Any interested party may appeal the administrator's decision on reconsideration to the board and unless an appeal is filed from such decision on reconsideration with the board within fourteen calendar days after such decision was mailed to the last known post office address of the appellant such decision on reconsideration is final and benefits shall be paid or denied in accordance therewith."

Upon an appeal to the court of common pleas, the dismissal order was reversed on the grounds that it was unreasonable and against the manifest weight of the evidence, and the case was remanded for further proceedings. We affirm.

We do not read the legislative intent to be that the mere fact that a notice of

an adverse administrative decision was mailed raises a conclusive presumption that the addressee received due notice. The referee, the Board of Review and the administrator all treated the mailing as equivalent to notice, apparently assuming that the mandatory language used by the General Assembly in R.C. § 4141.28(H) requires this result. We hold this is error. We cannot believe that if the notice is lost in the mail and is never found, as appears to have happened in this case, the addressee is nevertheless charged with notice so that the fourteen day period runs despite total lack of actual notice. Such a result would not be in conformity with the provision for liberal construction of remedial laws found in R.C. §1.11, nor with the presumption of R.C.§1.47 that a just and reasonable result is intended in the enactment of the statutes.

See Van Meter v. Segal-Schadel Co., 5 OhioSt.2d 185, 34 O.O.2d 345 (1966). Further, any such conclusive presumption would violate the principle of fairness mandated by the due process provision of the United States and Ohio Constitutions. See generally Mathews v. Eldridge, 424 U.S. 319 (1976); State ex rel. Hoel v. Brown, 105 OhioSt. 479 (1922); Wallen v. Bd. of Review, unreported, First Appellate District, No. C77528, decided October 18, 1978.

We hold that the referee and the Board of Review erred in failing to recognize that R.C. §4141.28(H) raises a rebuttable, not a conclusive presumption, from the bare fact of mailing that the claimant was in fact duly notified. The claimant is entitled to have his or her evidence heard and considered on the factual question of notice.

The referee may make a factual finding

supported by evidence of probative value that the claimant had actual or constructive notice, or he may decide that the claimant had neither. In the latter event, claimant would, conceivably, have a reasonable time to perfect an appeal. In the instant case, the referee made no such finding of fact, but simply charged appellee with notice on the basis of the certificate of mailing. This was unreasonable and unlawful.

The single assignment of error has no merit. We affirm.

Judgment affirmed.

Keefe, P.J., and Bettman, J., concur.

OPINION FIFTH APPELLATE DISTRICT, RICHLAND COUNTY, OHIO, CASE NO. CA-1828 MABLE J. McCRUTER v. BOARD OF REVIEW, PER CURIAM.

This appeal arises from a claim for unemployment compensation benefits which was denied by the Administrator of the Ohio Bureau of Employment Services on reconsideration on the ground that the claimant-appellant was discharged by her employer, White Westinghouse, Corp., for just cause in connection with her work.

The claimant filed a timely appeal from the administrator's March 7, 1978, decision on reconsideration and a hearing was held on April 41, 1978, before a referee of the Board of Review for the Ohio Bureau of Employment Services. The referee affirmed the Administrator's decision on reconsideration and notice

of the referee's decision was mailed to the claimant at her Mansfield residence on April 13, 1978, according to the certification of Kathy Watson.

Appeals from the decisions of a referee to the Board of Review are governed by the provisions of R.C. 4141.28 (L) which provides:

> "(L) All interested parties shall be notified of the referee's decision which shall include the reasons therefore, which decisions shall become final unless, within fourteen days after the decision was mailed to the last-known post office address of such parties, the board on its own motion removes or transfers such claim to itself or, an application to institute a further appeal before the board is filed by interested party and such appeal is allowed by the board." (emphasis added)

On May 2, 1978, nineteen days after the mailing of the notice of the referee's decision, the claimant-appellant filed an application to institute a further appeal. The application, sworn to by the claimant, stated, in pertinent part as follows:

"This appeal is being filed late because I never received a copy of my decision. I called on Thursday, 4-27-78 when I got the number from information (1-614-466-4636) and they said they would mail a copy of the decision. I received it on 4-28-78. I have not changed my address. Any absences that I ever had were for sickness and I always called in. I never had a warning since 1975. Some of the absences were due to five children at home, of which I am the head of the household. I always called in if they were sick. I was discharged without any warning whatsoever, or time off, or disciplinary action." (emphasis added)

On May 5, 1978, the claimant was notified that because the application to institute a further appeal appeared to have been untimely filed, the Board would direct that a hearing solely on the issue of the timeliness of the filing of the application to institute a further appeal would be conducted by a referee for and on behalf of the Board. Such a hearing was held on September 1, 1978. The hearing was brief. The preliminary remarks of the

referee failed to disclose that the hearing was for the limited purpose set forth in the May 5, 1978 order of the Board of Review. However, from the hearing, it became apparent that the claimant had not abandoned her position as set forth in her application to institute further appeal, and that she was claiming that the first notice she received came to her on April 28, 1978, after she had called the Bureau and inquired about the decision.

Subsequent to the hearing, the Board of Review in an unanimous decision delcared that the application to institute a further appeal was not filed within the statutory fourteen day period following the mailing of the referee's decision on April 13, 1978, as indicated by the certification of Kathy Watson. The Board of Review did not comment upon the sworn application and sworn testimony of the claimant to the effect that

she did not receive a copy of the decision of the referee until after she had called the Bureau on April 27, 1978.

The claimant prosecuted a timely appeal to the Common Pleas Court of Richland County which affirmed the Board of Review.

The matter is now before us on appeal. This appeal presents the question of whether certification as to the fact of mailing the referee's decision affirming the administrator's decision on reconsideration is, standing alone, dispositive of all claims regarding notice, constitutional and otherwise, where the party aggreived by the referee's decision makes oath that the notice of the decision was not received within the period during which the appeal must be perfected.

In so stating the question, we note that there is no claim presented that the claimant was living other than at the address where the certification was mailed,

i.e., 122 Raymond Street, Mansfield, Ohio, 44903.

In our view, certification as to the fact of mailing the referee's decision to the claimant at her last known address is not dispositive.

In so concluding, we rely upon and follow Adams v. Giles, 60 Ohio App. 2d 351, Motion to cert. overruled by the Supreme Court of Ohio, April 20, 1979. In Adams v. Giles, supra, the First District Court of Appeals held that under R.C. 4141.28(H), the mailing of the administrator's decision on reconsideration to an unemployment compensation claimant raises a rebuttable presumption that the claimant was in fact duly notified. R.C. 4141.28(H) provides for the same fourteen day period to perfect an appeal following the mailing of the notice as does R.C. 4141.28(L).

In following and apply Adams v. Giles to the case at hand, we observe that if

the answer is that certification as to the fact of mailing notice of the referee's decision is dispositive of all claims, such an answer surely violates the principles relating to notice protected by the due process provisions of the United States and Ohio Constitutions.[1]

In so concluding, we sustain both assignments of error.

Turning now to the disposition of the case sub judice, we find that the Board of Review made no finding of fact that the claimant had either actual or constructive notice of the April 13, 1978, decision of the referee. Rather, the Board of Review simply charged the claimant with notice on the basis of the certification with respect to mailing the decision. On the fact of this record, we find such a result both unreasonable and unlawful in that the claimant did within a reasonable

1. The appellee argues that the appellant did not raise the constitutional issue in the Common Pleas Court. We disagree.

time act in prosecuting an appeal upon receiving actual notice of the decision on April 28, 1978.

The judgment of the Common Pleas Court of Richland County is reversed and final judgment is entered remanding this cause to the Board of Review for the Ohio Bureau of Employment Services to allow and consider the appeal by the claimant from the April 13, 1978, decision of the referee denying the claimant unemployment compensation benefits.

/S/ David D. Dowd, Jr.

/S/ Norman J. Putman

/S/ Leland Rutherford

For the reasons stated in the Per Curiam Opinion on file, both assigned errors are sustained. The judgment of the Common Pleas Court of Richland County, Ohio, is reversed and a final judgment is entered remanding this cause to the Board of Review for the Ohio Bureau of Employment Services to allow and consider the appeal by the claimant, Mable J. McCrutter, from the April 13, 1978, decision of the referee denying the claimant unemployment compensation benefits.

/S/
David D. Dowd, Jr.

/S/
Norman J. Putman

/S/
Leland Rutherford

DECISION AND JOURNAL ENTRY C.A. No. 905
NINTH JUDICIAL DISTRICT, COURT OF APPEALS
MEDINA COUNTY, STATE OF OHIO

JAMES H. HOLMES v. UNION GOSPEL PRESS,

Dated: December 28, 1979

This cause was heard November 9, 1979, upon the record in the trial court, including the transcript of proceedings, and the briefs. It was argued by counsel for the parties and submitted to the court. We have reviewed each assignment of error and make the following disposition:

BELL, P.J.

James Holmes, appellant here, was employed by Union Gospel Press Inc. until March, 1978. He thereafter made request for and was denied unemployment compensation. Mr. Holmes requested the Bureau to reconsider its ruling and his request was honored. The reconsideration decision - again rejecting appellant's claim - was mailed to him on April 14, 1978. Mr. Holmes

appealed the decision, filing his notice of appeal with the Board of Review, May 3, 1978. This appeal was denied on jurisdictional grounds, a judgment subsequently affirmed by the Court of Common Pleas of Medina County. Holmes now brings his cause to this court for review claiming:

> "Section 4141.28(H) is constitutionally defective when it deprives a claimant of a right of appeal, where he has never received notice of a decision by the administrator of the bureau of unemployment compensation."

As is apparent from our brief recital of fact, Mr. Holmes filed his appeal to the Bureau of Unemployment's Board of Review more than 14 days after the documented mailing of the notice of the decision. The record of proceedings before the Board of Review indicates that appellant did not receive the decision notice even though the address to which it was sent was a correct one and one at which Mr. Holmes resided at all times pertinent to the appeal.

It would appear (though the record is not completely clear in this respect) that appellant found out about the decision by accident and thereafter filed his notice of appeal.

The Board of Review ruled in essence that it had no jurisdiction to hear the Holmes appeal because of the mandate set forth in R.C. 4141.28(H). The common pleas court agreed with this position as do we.

The statute in question reads in pertinent part:

> "Any interested party may appeal the administrator's decision on reconsideration to the board and unless an appeal is filed from such decision on reconsideration with the board within fourteen calendar days after such decision was mailed to the last known post office address of the appellant such decision on reconsideration is final and benefits shall be paid or denied in accordance therewith."

It is to be noted that the statute does not preclude Mr. Holmes or any other claimant a right of appeal as implied in the

assignment of error. Rather, it sets forth the procedure governing the pre-condition of acceptance of the appeal for hearing by the Board. We do not view such standard as being unduly capricious or arbitrary in nature so as to give rise to any claim that a claimant is in fact deprived of appellate rights. We add to that view the common legal presumption of constitutional validity. We find no lack of constitutional due process protection in the application of such standards given the need of a claimant's right of appeal, as balanced by the Bureau's need to handle its affairs with efficiency, dispatch and with some reasonable expectation of finality.

We do not repeat it here, in its entirety, but accept with approval the doctrine enunciated on this subject in Wilson v. Board of Review, Cuyahoga No. 37800 (8th Dist. Ct. App., December 28, 1978). In the interest of brevity, we do not quote at length from

that opinion, accepting its validity as did the court below.

We hold that where it is affirmatively shown that notice of a decision rendered by the Bureau of Unemployment Services is mailed to an applicant, said decision is to be considered as final unless appeal therefrom be filed within 14 days of the mailing of the notice. If, however, under such circumstances, appeal is not filed within the prescribed 14 day period, claimant's appeal is jurisdictionally barred. We further hold R.C. 4141.28(H) to be constitutionally valid.

The judgment is affirmed.

-

The court finds that there were reasonable grounds for this appeal.

We order that a special mandate, directing the Medina County Common Pleas Court to carry this judgment into execution, shall issue out of this Court. A certified copy

of this journal entry shall constitute the mandate, pursuant to App. R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period of review shall begin to run. App. R. 22(E).

Costs taxed to appellant.

Exceptions.

/S/ Bell, presiding

MAHONEY, J.

HUNSICKER, J.

CONCUR

OPINION MEDINA COUNTY COMMON PLEAS COURT

Re: Case No. 34244
Holmes v. Union Gospel Press

The Court has considered this appeal based on the transcript of prior proceedings and oral argument of counsel.

A reading of the Statute 4141.28(H), as amended in 1975, reveals that an appeal from the Administrator's decision may be made but must be made within fourteen calendar days after such decision was mailed to the last known post office address of the appellant. The Bureau's records reflect that the decision was mailed to the appellant on April 14, 1978, to his address at 116 West North Street, Medina, Ohio. The appellant nowhere in the records challenges the Bureau's certification that the decision was mailed on April 14, 1978, his position being that he never received it.

The recent case of Wilson v. Bd. of Review, et. al. in the Cuyahoga County Court of Appeals, No. 37800, is a well-reasoned opinion and covers appellant's contention here that he was denied due process as well as the question of the timeliness of the appeal.

The appellant did not file his notice of appeal from the Administrator's decision on Reconsideration within the fourteen day limitation set out in Revised Code 4141.28(H). It was filed on May 3, 1978.

As to the question of due process, the Court agrees with and adopts the reasoning of the Cuyahoga County Court of Appeals in the Wilson case.

Accordingly, the Court finds that the decision of the Board was lawful, reasonable, and in accord with the manifest weight of the evidence and hereby affirms said decision.

/S/ Phillip A. Baird

DECISION, BOARD OF REVIEW, OHIO BUREAU OF EMPLOYMENT SERVICES

IN RE CLAIM OF: JAMES H. HOLMES

EMPLOYER: UNION GOSPEL PRESS

By a decision on reconsideration, mailed April 14, 1978, the Administrator disallowed claimant's application for determination of benefit rights, dated February 20, 1978, on the ground that claimant's base period employment was not covered.

On May 3, 1978, claimant appealed.

On may 31, 1978, a hearing was held at Akron, Ohio.

Apperances: Claimant appeared in person.

Union Gospel Press was represented by Lester Farber, Attorney at Law.

FINDINGS OF FACT:

On April 14, 1978, the Administrator mailed a copy of the decision on reconsideration referred to above to the last known post office address of the appellant. The fact

of the mailing on said date is evidenced by a certification of the depositing of the enclosing envelope in a depository for the mail. Said certification is a part of the file certified to the Board of Review by the Administrator of the Bureau of Employment Services.

On May 3, 1978, the appellant appealed by filing a written statement in a local office of the Bureau on said date.

REASON:

Issue: Timeliness of appeal (jurisdiction of the Referee).

Law applicable: Section 4141.28(H), Revised Code of Ohio.

The above referred to section of the Revised Code of Ohio provides that a decision on reconsideration shall become final and benefits paid or denied in accordance therewith unless an appeal is filed within fourteen (14) calendar days subsequent to the date of mailing said decision to the interested party's last known post office

address. The fourteen day period is statutory and compliance with this statutory requirement is mandatory in order for the Referee to acquire jurisdiction over the merits of a case (See Knoll v. Dudley, 20 Ohio App. 2d 339)

The appeal in the instant case was not filed within the statutory fourteen (14) calendar day period following the mailing of the Administrator's decision on reconsideration on April 14, 1978. The appeal filed on May 3, 1978, was not timely filed, thus, the Referee acquires no jurisdiction to determine the merits of the appeal.

DECISION:

The appeal filed by claimant on May 3, 1978, was not filed within the statutory fourteen (14) calendar day period following the mailing of the Administrator's decision on reconsideration on April 14, 1978. Said appeal is hereby dismissed.

/S/ Boris Rakowsky, Referee

Date of mailing: June 2, 1978

DECISION, BOARD OF REVIEW, OHIO BUREAU OF EMPLOYMENT SERVICES

IN RE CLAIM OF: JAMES H. HOLMES

EMPLOYER: UNION GOSPEL PRESS

On June 13, 1978, the claimant filed an application to institute a further appeal before the Board of Review, pursuant to the provisions of Section 4141.28, Revised Code of Ohio, from the decision of the Referee dated June 2, 1978.

Issue: Timeliness of appeal.

Upon consideration thereof, and upon a review of the entire record, the Board concludes that said application to institute a further appeal should be disallowed.

DECISION:

Said application to institute a further appeal is hereby disallowed.

BOARD OF REVIEW

/s/ Willard D. Campbell
Chairman

/S/ John E. Jones, Member

/S/ Francis M. Brockmeyer
Member

Date of mailing: 7/12/78

OPINION, COURT OF APPEALS OF OHIO, EIGHTH DISTRICT, COUNTY OF CUYAHOGA, CASE NO.37800

STEPHANIE WILSON v. BOARD OF REVIEW

Date: December 28, 1978

Pryatel, J.:

This cause came on to be heard upon the pleadings and the transcript of the evidence and the record in the Common Pleas Court, and was argued by counsel for the parties; and upon consideration, the court finds no error prejudicial to the appellant and therefore the judgment of the Common Pleas Court is affirmed. Each assignment of error was reviewed and upon review the following disposition made:

This appeal arises from the denial of appellant Stephanie Wilson's claim for extended benefits by the appellee Ohio Bureau of Employment Services and appellee's determination of appellant's monetary liability incurred as a result of her receiving payments initially provided to her by appellee.

Appellant worked for Westinghouse Corporation. She was laid off on May 3, 1974 for which she was provided unemployment benefits by teh appellee administrator.

By way of background, evidence in the administrator's file discloses the following facts.

On March 21, 1975 appellant applied for extended benefits which were initially granted her by the administrator. Pursuant to R.C. §4141.28 notice was sent to Westinghouse informing them of their right to request a "reconsideration" of the "determination" to extend appellant's benefits. Westinghouse filed such a request claiming appellant had refused an opportunity to work without showing good cause for her refusal as required under R.C. §4141.29(D)(2)(b).

Notice of a fact finding interview for "reconsideration" was mailed to both

parties and the interview was held on April 21, 1975. On May 9, 1975 the administrator notified the appellant by mail that her extension had been denied upon reconsideration; however, rather than terming such decision a "reconsideration" as he should have done, it was instead recorded upon a form under the heading "determination," even though the determination stage had already been concluded previously.

This administrative error resulted in such confusion that appelant was allowed to submit on May 16, 1975 a "reconsideration" request (as Westinghouse had done previously to set up the April 21, 1975 interview). Then, on May 22, 1975 the administrator issued a second reconsideration decision, (again headed "determination" adverse to appellant. The second decision reflected an increase of appellant's

monetary laibility since she had been receiving extended benefits since the initial March 21, 1975 payment.

Appellant was allowed to fill out yet another "reconsideration" request on June 3, 1975, the third such request filed. Then, presumably realizing the prior administrative error, the bureau had appellant withdraw on (June 13, 1975) her May 16, 1975 "reconsideration" request.

On August 1, 1975 the administrator finally issued his reconsideration decision- based upon the findings in the April 21, 1975 interview requested by Westinghouse- again adverse to appellant. The decision denied extended benefits and fixed monetary liability equal to the amount set in the May 22, 1975 "determination."

Coming to the evidence that directly bears upon this appeal, the administrator's file shows that the August 1, 1975 notice was sent by regular mail to appellee's then current address in Cleveland. Appellee

later testified that the address had remained unchanged since June, 1975. (Referee's Hearing Tr. 2).

Pursuant to R. C. §4141.28(H), appellant had fourteen (14) days from the August 1, 1975 mailing date to file an appeal to the referee. She did not do so until August 19, 1975, at which time she reported in person to the bureau.

A hearing was held before a referee on September 12, 1975. Upon ascertaining that appellant had resided at the same address to which the August 1, 1975 notice was sent, the referee asked:

> "Q. And what is the reason you filed your appeal more than 14 days from the date of mailing of the decision on reconsideration?
>
> "A. Because I didn't receive it, I didn't receive it in the mail. I had just moved and the mail, mailman didn't get to my; mail mail mixed up, I think the girl downstairs must have got it because I didn't get it, so I went back to the Unemployment office and he told me, you know, they had sent one out, but I didn't get it."

The referee inquired no further into appellant's failure to appeal the decision within the 14-day period.

On September 17, 1975 the referee decided that since appellant had failed to appeal in a timely fashion, he had no jurisidction to decide her appeal. The "reconsideration decision" of August 1, 1975 therefore became the final resolution of appellant's claim for extended benefits.

Appellant's appeal to the Board (of the referee's decision) was disallowed on October 17, 1975, providing the basis for her appeal to the Cuyahoga County Court of Common Pleas. That court affirmed the decision of the administrative board.

Appellant presents three assignments of error upon appeal to this court.

I. §4141.28(H), R.C. SHOULD BE LIBERALLY CONSTRUED TO PERMIT A NOTICE OF APPEAL IN A CLAIM FOR UNEMPLOYMENT COMPENSATION TO BE CONSIDERED TIMELY WHEN THE CLAIMANT, THROUGH NO FAULT OF HER OWN, DID NOT HAVE NOTICE

OF AN ADVERSE DECISION UNTIL AFTER THE EXPIRATION OF THE PERIOD FOR FILING HER APPEAL.

Section 4141.28 (H) provides:

"(H) Any interested party may appeal the administrator's decision on reconsideration to the board and unless an appeal is filed from such decision on reconsideration with the board within fourteen calendar days after such decision was mailed to the last known post office address of the appellant such decision on reconsideration is final and benefits shall be paid or denied in accordance therewith."

The right to appeal in an unemployment compensation proceeding is statutory, and the time limit provision of R.C. §4141.28 is mandatory. Zier v. B.U.C. (1949), 151 Ohio St. 123; American Restaurant & Lunch Co. v. Glander (1946), 147 Ohio St. 147; Knoll v. Dudley (1969), 20 Ohio App. 2d 339; McCoy v. B.U.C. (1948), 81 Ohio App. 158. Ohio courts have consistently held that where a claimant for unemployment compensation does not file his notice of appeal in accordance with statutory provisions, a Board of Review is without jurisdiction to entertain the appeal.

Knoll v. Dudley, supra. Where the statute clearly stated the method by which an appeal is initiated, "substantial compliance with these mandatory requirements constitutes a condition precedent to the right to be heard . . . ." Zier v. B.U.C., supra; American Restaurant & Lunch Co. v. Glander, supra at 150.

Appellant argues that recent decisions in Ohio mark a trend toward a more liberal reading of the statutory language which mandates the appeals procedure to be followed. Wycoff v. Fotomat Corp.(1974) 38 Ohio St. 2d 196; King v. Garnes (1973), 36 Ohio St. 2d 187; Granakis v. B.U.C. (1967), 12 Ohio Misc. 86; Van Meter v. Segal-Schadel Co.(1966), 5 Ohio St. 185. We disagree.

It is true, as appellant contends, that the courts in those cases scrutinized the notice procedures followed. Prior to its amendment in 1975 R.C. §4141.28 was

ambiguous in indicating the date from which one counted the time to appeal a decision. Where the mailing date could only be speculated upon the ambiguity was resolved in favor of the appellant. Wycuff, supra; King, supra. Such decisions were simply based upon common sense: How can one start counting the days in which to appeal without proof of a starting point? Accordingly the statute was amended in 1975 to resolve this ambituity.

Under the present statutory provisions the time in which to appeal begins to run from the date the Bureau mails its decision. (R.C. §4141.28). In the instant case, the mailing date of August 1, 1975 is uncontested and is supported by proof in the administrator's file.

We can see no reason to read into the language of the statute a meaning other than that which is clearly and unambigouously

stated. To do so would result in the "exercise of the legislative power of amendment under the mask of so-called interpretation." Adamski v. B.U.C. (1959), 108 Ohio App. 198.

The notice was mailed on August 1, 1978 to appellant's proper address. When the referee ascertained these facts, along with the acknowledgment of the appellant that she filed her appeal beyond the 14 day limit, he correctly determined the reconsideration decision of August 1, 1975 to be a final order purusant to the clear-cut guidelines of R.C. §4141.28.

Accordingly, the first assignment of error is overruled.

II. §4141.28(H) R.C. VIOLATES THE DUE PROCESS CLAUSE OF THE 14TH AMENDMENT OF THE U.S. CONSTITUTION IF IT IS INTERPRETED TO MAKE A CLAIMANT'S APPEAL UNTIMELY WHEN THAT CLAIMANT HAS NOT SENT NOTICE OF AN ADVERSE DECISION REASONABLY CALCULATED TO ALLOW HER TIME TO FILE HER APPEAL AND NO PROVISION EXISTS FOR SHOWING GOOD CAUSE FOR THE LATE FILING OF THE APPEAL.

III. THE BOARD OF REVIEW DENIED APPELLANT A FAIR HEARING IN VIOLATION OF 42 U.S.C. § 503(a)(3) and §4141.28(J) O.R.C. BECAUSE ITS CONSTRUCTION OF §4141.28(H) O.R.C. PREVENTED ANY CONSIDERATION OF WHY APPELLANT DID NOT FILE HER APPEAL WITHIN THE 14-day LIMIT.

The court will discuss appellant's second and third assignments of error together since they assert that appellant was denied due process through the strict interpretation of R.C. §4141.28.

Administrative proceedings of a quasi-judicial nature affecting the property and rights of an individual must comport with the fundamental safeguards of due process, which require providing timely notice of the proceedings and a hearing affording an individual the opportunity to confront and cross-examine witnesses. Goldberg v. Kelly (1970), 397 U.S. 254, 25 L.Ed. 2d 287, 90 S. Ct. 1011.

In Goldberg, supra, the U.S. Supreme Court held that welfare benefits "are a matter of statutory entitlement for persons qualified to receive them . . ." and that

termination of those benefits without affording the opportunity for an evidentiary hearing prior to termination constitutes state action denying procedural due process to the recipient.

the degree to which procedural safeguards are required under due process is determined by weighing the extent to which a recipient may be "condemned to suffer grievious loss", versus "the governmental interest in summary adjudication" of benefit claims. Goldberg, supra at 296.

Appellant contends, and we agree, that unemployment compensation is as vitally important as are welfare benefits. California Department of Human Resources Development v. Java (1971), 402 U.S. 121, 28 L. Ed. 2d 666, 91 S. Ct. 1347. Important governmental interests are promoted in providing uninterrupted welfare benefits to those eligible to receive them. Goldberg, supra at 297.

Governmental interest is also promoted by ensuring that adequate due process safeguards are afforded those eligible to receive unemployment benefits.

In the instant case, a close review of the proceedings indicates that appellant was provided reasonable opportunity to be heard and challenge the evidence against her prior to the termination of her benefits. However, appellant also asks this court to look to the narrower question of whether the statutory provision for notice of appeal under requisites of due process. Mullane v. Central Hanover Bank and Trust Co. (1949) 339 U.S. 306, 94 L.Ed. 865.

Appellant does not conted that the notice of her right to appeal the administrator's reconsideration was not mailed to her address on August 1, 1975, nor does she deny that it was selivered; indeed she believed "that the girl downstairs must have got it."

She argues that the use of ordinary mails to provide her with notification of her right to appeal was inadequate. Further, she contends that statute allows her no opportunity to show good cause of her failure to appeal on time and as a consequence, she is precluded from unemployment compensation in violation of due process of law. We disagree.

A hearing was held before a referee in which appellant, her mother and representative from Westinghouse Corp. were present. Testimony indicated that appellant moved often and, in fact, her transience possibly contributed to her failure to respond to her former employer's recall letter. Appellant simply claimed she never received the notification letter of August 1, 1975. She moved often, yet appellee mailed the letter to the same address at which appellant admittedly had been living for at least two months. The letter was not returned

by the post office as being undeliverable, nor was it necessary to forward the letter to a different address.

Although appellant extensively argues for the employment of alternative methods of providing notice of the right to appeal (i.e., certified mail or extension of the 14-day filing period), we hold that the existing statutory provisions adequately afforded her protection of her rights under due process of law. It is not for this court but rather the legislature to decide whether or not appellant's suggestions for other methods to provide notice may improve the existing provisions of R.C. §4141.28.

Accordingly, appellants second and third assignments of error are overruled.

Judgment affirmed.

/s/ Judge August Pryatel

KRENZLER, P.J.

JACKSON, J., CONCUR

APR 1981

CASE NO. 80-1600

IN THE

SUPREME COURT OF THE UNITED STATES

JANUARY TERM, 1981

JOHN H. HOLMES

Petitioner,

v.

UNION GOSPEL PRESS and STATE OF OHIO,
OHIO BUREAU OF EMPLOYMENT SERVICES

Respondents.

ON APPEAL FROM
THE SUPREME COURT OF OHIO

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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Employment Services

CASE NO. 80-1600

IN THE

SUPREME COURT OF THE UNITED STATES

JANUARY TERM, 1981

JOHN H. HOLMES

Petitioner,

v.

UNION GOSPEL PRESS and STATE OF OHIO,
OHIO BUREAU OF EMPLOYMENT SERVICES

Respondents.

STATEMENT OF THE CASE

On or about June 20, 1977, James H. Holmes, hereinafter referred to as the claimant/appellant, began working for the Union Gospel Press, 2000 Brookpark Road, Cleveland, Ohio. The Union Gospel Press is a subsidiary of the Gospel Worker's Society, a church group, which is a non-profit corporation engaged in missionary work. Under the unemployment compensation laws of the State of Ohio, employees of non-profit religious associations are not eligible for unemployment benefits unless the non-profit religious association has elected to be covered.[1] The Union Gospel Press, at the time in question, has not elected coverage.

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1. Sections 4141.01(X), 4141.01(B)(3)(1) and 4141.241, Ohio Revised Code.

On February 17, 1978, the claimant became separated from his employment with the Union Gospel Press and filed a claim for unemployment with the Union Gospel Press and filed a claim for unemployment compensation benefits. On March 29, 1978, a "Determination of Application for Benefit Rights" was mailed to the claimant informing him that his claim for benefits was being disallowed because his employer had not elected to be "covered" by the unemployment insurance laws of Ohio. The claimant requested "Reconsideration" and, on April 14, 1978, the Administrator's Decision on Reconsideration was mailed to the claimant's last known post office address. This decision *was received* by the claimant, although he chose not to acknowledge it. (R 31) The claimant thereafter attempted to appeal to the Unemployment Compensation Board of Review by filing a Notice of Appeal on May 3, 1978. Under Section 4141.28(H), Ohio Revised Code, the Appellant's appeal was untimely.

A hearing was held on May 31, 1978 before Boris Rakowsky, a duly appointed referee of the Unemployment Compensation Board of Review wherein the question of timeliness of appeal was considered. At this hearing, the claimant did not raise or allude to any constitutional issue. On June 2, 1978, Referee Rakowsky issued a decision holding that the claimant's appeal to the Board of Review from the Administrator's decision on Reconsideration had been untimely filed and that the Board of Review therefore lacked jurisdiction to hear the appeal.

The claimant, through counsel, requested further appeal to the Board of Review. The claimant's request for further appeal likewise did not attempt to raise a constitutional issue. On July 12, 1978, the Board of Review disallowed further appeal.

On or about July 24, 1978, the claimant, through counsel, filed an appeal to the Common Pleas Court of Medina County. The claimant's July 24, 1978 Notice of Appeal similarly failed to raise a constitutional issue.

On July 30, 1979, Judge Phillip A. Baird held that the decision of the Board of Review in the instant case was not unreasonable, unlawful, or against the manifest weight of the evidence and affirmed the Board's decision.

On August 28, 1979, a Notice of Appeal to the Court of Appeals was filed by the claimant and, on December 28, 1979, the Court of Appeals affirmed the decision of the Common Pleas Court. Thereafter, the claimant moved to amend his brief to include the case of **Adams v. Giles**, 60 Ohio App. 2d 351 hereinafter referred to as **Adams** and, on January 14, 1980, moved for certification of conflict.

On March 24, 1980, the instant case was certified to the Ohio Supreme Court as in conflict with judgments of the Court of Appeals of the Fifth District in **Mable J. McCruter v. Board of Review, et al.**, Richland Co., No. 1828 (reversed 64 Ohio St. Ed. 277) and the **Adams** case, *supra.*

1. THIS COURT LACKS JURISDICTION TO REVIEW STATE COURT DECISIONS RESTING ON ADEQUATE STATE GROUNDS.

In the case of **Herb v. Pitcairn**, 324 U.S. 117 (1954) Justice Jackson, speaking for the Court stated that this Court has, from the time of its foundation, adhered to the principle that it will not review judgments arising out of the state courts which rest on adequate and independent state grounds. In more recent years, this Court has held that no review will lie where a party has merely failed to abide by a state procedural requirement because such matters are adequate state grounds. (See **Michigan v. Tyler**, 436 U.S. 499 (1978); **Parker v. North Carolina**, 397 U.S. 790 (1970).

In the instant case, the Appellant's case was dismissed because of his failure to follow the simply procedural requirements of Section 4141.28(H), Ohio Revised Code, in that his appeal to the Board of Review, Ohio Bureau of Employment Services was filed beyond the mandatory fourteen day period.

As stated in the section styled Statement of the Case, the decision of the Administrator upon reconsideration was mailed to the claimant on April 14, 1978; however, the claimant's appeal to the Board of Review was not received until May 3, 1978.

Section 4141.28(H) states:

> "(H) Any interested party may appeal the administrator's decision on reconsideration to the board and unless and appeal is filed from such decision on reconsideration with the board within fourteen calendar days after such decision was mailed to the last known post office address of the appellant such decision on reconsideration is final and benefits shall be paid or denied in accordance therewith."

2. THE PETITIONER LACKS STANDING TO RAISE A CONSTITUTIONAL ISSUE.

The petitioner would raise the question of the adequacy of notice; however, the undisputed evidence in the instant case establishes that the petitioner has no standing to make such an assertion.

In a long line of cases, this Court has established the doctrine that "justiciability", as required by the case or controversy language of Article III of the U.S. Constitution, will depend in part upon "standing". Although "standing" is an amorphous concept (**Flast v. Cohen**, 392 U.S. 83), it requires that the challenging party has been injured in fact by the challenged action. **Association of Data Processing Service Organizations, Inc. v. Camp** (1969) 397 U.S. 150, **Duke Power Co. v. Carolina Environmental Study Group, Inc.** (1978) 438 U.S. 59, **Simon v. Eastern Kentucky Welfare Rights Organization**, 426 U.S. 26.

In the instant case, the appellant would like to raise the question of the constitutionality of Section 4141.28(H) in a situation wherein the claimant does not receive a copy of the Administrator's decision on reconsideration; however, the facts in this case are otherwise. At page 6 and 7 of the transcript of the hearing before the Board of Review, the Appellant *admitted receiving* a copy of the decision of the Administrator. This court has traditionally held that where, under one state of facts, the operation of a statute is consitutional, this Court will not

declare it invalid because, under another state of facts, not involved, its operation may be challenged. See **Dahnke-Walher Milling Co. v. Bondurant**, 257 U.S. 282, 289, 42 S. Ct. 106.

3. THE INSTANT CASE INVOLVES A POLITICAL QUESTION.

It has been the policy of this Court for many years to avoid questions that might require the Court to impinge upon the prerogatives of other branches of government. **Baker v. Carr**, 369 U.S. 186, 210, 2S. Ct. 691. In the instant case, the executive branch of the Federal government has determined, through the Secretary of Labor, that states wishing to receive Federal tax credits for approved unemployment compensation programs adhere to certain time frames for the final disposition of cases. See 42 U.S.C. 503 and 20 C.F.R. 640.5. Under the Federal time lapse requirements, some final action must be taken on an Administrator's decision within fourteen days from the date on which it was rendered. To calculate the appeal time from the date of a claimant's receipt, or to hold all action in abeyance until receipt would mean that the Ohio Bureau of Employment Services could not comply with the time lapse provisions dictated by the Secretary of Labor.

4. THE INSTANT CASE INVOLVES QUESTIONS OF STATE'S RIGHTS.

In **Ohio Bureau of Employment Services v. Hodory**, 431 U.S. 471 (1977), this Court held that the States were free to formulate their own unemployment compensation programs subject only to the contractual provisions of 42 U.S.C. 503 concerning funding. Nothing in 42 U.S.C. 503 [2] requires that the States guarantee absolute notice to each and every claimant; therefore, the type of notice must be a function delegated to the States. Even under this Court's decision in

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2. It is interesting to note that even 42 U.S.C. 503 requires only "substantial compliance" with its standards.

Mullane v. Central Hanover Bank and Trust (1950) 339 U.S. 306, it was held that notice need only be "reasonably"calculated to apprise the parties of the pendency of the action. Therefore, absent some requirement of 100% absolute notice, the statute here involved, Section 4141.28(H), is not constitutionally infirm and no Federal challenge can be heard.

5. THE PETITIONER IS ATTEMPTING TO RAISE NEW ISSUES FOR THE FIRST TIME ON APPEAL.

In **Yakus v. United States,** 321 U.S. 414, this Court held:

> "No procedural principle is more familiar to this court than that a constitutional right may be *forfeit* in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it."

In the instant case, all of Appellant's arguments relating to the applicability of 42 U.S.C. 503 and the constitutionality of 4141.28(H), Ohio Revised Code were raised for the first time *on appeal* below. The petitioner utterly failed to raise any of these issues before the Board of Review or in his Notice of Appeal to the Common Pleas Court. He cannot now in good faith suggest that the Board of Review committed an error by not deciding an issue not raised before them.

CONCLUSION

It is respectfully submitted that the decision of the Ohio Supreme Court was correct and should be affirmed or, in the alternative, that the Appellant's appeal should be dismissed because of a lack of a substantial federal question.

Respectfully submitted,

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Attorneys for Respondent

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief in Opposition to Petition for Certiorari of the State of Ohio was mailed to John C. Oberholtzer, counsel for Petitioner, P.O. Box J, Medina, Ohio 44256 and to Lester J. Farber, counsel for Respondent-employer, 1550 Leader Building, Cleveland, Ohio 44114 on this the _____day of April, 1981.

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No. 80-1600

In the Supreme Court of the United States

October Term, 1980

JAMES H. HOLMES,
Petitioner,

vs.

UNION GOSPEL PRESS,
STATE OF OHIO,
and
OHIO BUREAU OF EMPLOYMENT SERVICES,
Respondents.

ON THE PETITION FOR A WRIT OF CERTIORARI
TO THE OHIO SUPREME COURT

BRIEF FOR THE RESPONDENT, UNION GOSPEL PRESS, IN OPPOSITION

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STATEMENT OF THE CASE

Respondent, Union Gospel Press, accepts the Statement of Facts appearing in the Petition for Writ of Certiorari as substantially correct except as specifically hereinafter distinguished. These are items that have either been not stated or misstated.

I. Petitioner's claim for benefits was disallowed because the Respondent Union Gospel Press had not elected to be covered by the Ohio unemployment insurance laws.

This fact raises a basic question of standing in that no property right thus existed. The nature of the Union Gospel Press is that it is an affiliate of a church organization, The Incorporated Trustees of the Gospel Worker Society, a non-profit corporation performing missionary services. As a non-profit religious association, employees such as Petitioner herein are not eligible for unemployment benefits unless the employer elected coverage, which was *not* the case herein. Thus there is not a legitimate claim of entitlement.

II. Petitioner states that after he made application for unemployment benefits with the Ohio Bureau of Employment Services, he went to the local office of said agency after a period of time to inquire as to the status of his benefits. In actuality, there was one step prior to this not mentioned. Petitioner was separated from employment with Respondent on February 17, 1978, and soon thereafter he did file a claim for unemployment compensation benefits. In response to this initial filing *the Bureau mailed and Petitioner received* on March 29, 1978, a "Determination of Application for Benefit Rights" informing him that his claim for benefits was being disallowed because the employer, a religious charitable organization, had not elected coverage. This mailing was via regular mail service pursuant to statute. Petitioner *received* this notice at his residence which remained the same throughout this entire matter, and responded by requesting "Reconsideration." It is from this decision mailed by the Bureau of Employment Services on April 14, 1978, that Petitioner failed to timely appeal pursuant to Ohio Revised Code § 4141.28 (H). In reference to this, there is a dispute as to whether Petitioner received that notice of denial as was raised at the Referee's Hearing of the Ohio Bureau of Employment Services (Petitioner's App. G-1-5).

III. Petitioner failed to raise any constitutional issue, or even hint at same at the Referee's Hearing conducted on May 31, 1978 (Referee Boris Rakowsky, Unemployment Compensation Board of Review), and at every administrative appeal thereafter. The first instance wherein a constitutional issue (due process) was raised was at the Medina Common Pleas Court Appeal which was not an appeal de novo (O.R.C. § 4141.28).

REASONS WHY THE WRIT SHOULD BE DENIED

Petitioner seeks this Court's review based on two (2) constitutional questions, due process and fair hearing. These questions were not, however, raised properly below and therefore, are not properly before this Court. Responding to Petitioner's reasons in the order presented it becomes clear that the Writ should be denied.

I. Due Process

Petitioner fails to demonstrate a denial of due process of law occurred in violation of 42 U.S.C. 503 (2) (3). Petitioner attacks the Ohio Supreme Court's reliance on the United States Supreme Court's decision in *Mullane v. Central Hanover Bank and Trust Co.* (1950), 339 U.S. 306, 94 L. Ed. 2d 865. The Court in *Mullane* articulated the precise test of determining the constitutionality of a notice mechanism wherein it held, at page 314, that a method for providing notice must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane* further went on to add at page 318 that notification "by ordinary mail to the record addresses" comports with due process requirements.

The notice mechanism provided for in O.R.C. § 4141.28 (H) is pursuant to the *Mullane* test, reasonably calculated to give interested parties notice of a pending action. The Ohio Supreme Court endorsed this test in the instant case and also in a similar recently decided case, *In re Foreclosure of Liens* (1980), 62 Ohio St. 2d 333, also involving the constitutionality of an ordinary mail service status, O.R.C. § 5721.18 (B) (dealing with a foreclosure action).

The United States Supreme Court has affirmed and followed the *Mullane* decision in many instances since 1950. The within case is not unique in any manner and therefore, is a bad vehicle for alleged constitutional violations.

One important factor to reiterate is that contrary to Petitioner's statement of facts, it is *not* without doubt as to whether Petitioner ever received the decision which gave right to an appeal. On the contrary, this was clearly in question as was raised and noted at the initial Referee Hearing before the Bureau of Unemployment Services. All factors presented indicated that Petitioner did, in fact, receive the notice. He had received the original "Determination of Application for Benefit Rights" by regular mail service and appealed timely therefrom and the record reflected that on April 14, 1978, the Medina Post Office had deposited the Reconsideration Decision in the United States Depository. Petitioner raises the "fortuitous encounter" theory of discovering that a notice was mailed. Respondent submits that it would raise havoc with the State system of notice if anyone could declare a violation of due process by merely stating non-receipt in the face of all other factors indicating proper service. Therefore, an "irrebuttable presumption" of service thus protects the integrity of the State's notice system by preventing mere allegations of non-receipt from interfering with the orderly flow of the administrative bureaucracy.

II. Fair Hearing

Petitioner fails to demonstrate that the procedure involved in the instant case is unfair as prescribed by 42 U.S.C. 503 (2) (3). Petitioner states that in order for a fair hearing to be conducted it must provide for the opportunity to rebut the presumption of notice, contra to the holding of the Ohio Supreme Court in this case and followed in *In re Foreclosure of Liens.*

The right to appeal in unemployment compensation proceedings is statutory and the time-limit provision of O.R.C. § 4141.28 is mandatory. *See Todd v. Garnes* (1975), 44 Ohio St. 2d 56, 57 wherein it was held that "compliance with these specific and mandatory requirements governing the filing of such notice is essential to invoke jurisdiction . . . ."

O.R.C. § 4141.28 is precise in its interpretation and plain meaning, fourteen (14) days from mailing! This is jurisdictional and failure to comply precludes the right to appeal. Petitioner is attempting to create a rebuttable presumption on receipt of service. That is clearly not the case herein, and this service requirement as noted before does comport with due process. The Ohio statute clearly conforms to all constitutional requirements of a fair hearing and Petitioner's only obligation to avail himself of same was to timely appeal.

Petitioner's claim of violation of constitutional fairness is unfounded and should not be reviewed by this court.

III. Waiver of Constitutional Rights for Failure to Properly Raise Below

Petitioner's Writ of Certiorari to the Ohio Supreme Court based on alleged violations of Due Process and Fairness should not be granted for hearing because of a failure to properly raise these constitutional issues below.

Petitioner failed to raise these constitutional issues at the trier-of-fact level (Board of Review, Ohio Bureau of Employment Services) and at the Medina County Court of Common Pleas in his Notice of Appeal. This basic question of standing has been reviewed by the Ohio Supreme Court (*State v. Davis* (1964), 1 Ohio St. 2d 28; *State v. Childs* (1968), 14 Ohio St. 2d 56, *cert. denied* 394 U.S. 1002; and *Stacy v. Van Coren* (1969), 18 Ohio St. 2d 188) and by the United States Supreme Court in *Yakus v. United States*, 321 U.S. 414. The record is devoid of a federal constitutional question, thus this Court should deny the Writ.

IV. Supreme Court of Ohio—Court of Last Resort

Petitioner's Writ of Certiorari should be denied because the Court of last resort, the Ohio Supreme Court, gave Petitioner a full opportunity to be heard on his questions of timeliness of appeal and its constitutionality. This matter involved the interpretation of a State of Ohio statute and by endorsing said statute as comporting with standards of due process on both the state level and federal (*Mullane* decision) level this Court should not interfere with such holdings by rehearing the same issues previously dealt with in *Mullane*. Therefore, this Court should decline to hear this case.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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